

JUN 27 1979

MICHAEL RODAK, JR., CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1978

No. 78-1904

HOWARD MORLAND, ERWIN KNOLL,
AND SAMUEL DAY, JR.,

Petitioners,

v.

THE HONORABLE ROBERT A SPRECHER AND
THE JUDGES OF THE UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT,

Respondents.

RESPONSE TO MOTION FOR LEAVE TO FILE A
PETITION FOR WRIT OF MANDAMUS AND
PETITION FOR WRIT OF MANDAMUS

Acting Chief Judge Walter J. Cummings on behalf of the
United States Court of Appeals for the Seventh Circuit files

this Response to the Petition for Leave to File a Petition for Writ of Mandamus.*

In support of this Response, Acting Chief Judge Walter J. Cummings states the following:

- 1) Although the preliminary injunction which was appealed in No. 79-1428 was entered on March 26, 1979, the joint notice of appeal of The Progressive, Inc., and the individual defendants was not filed until April 12, 1979;
- 2) Prior to the filing of the notice of appeal, John L. Gubbins, Senior Staff Attorney for the United States Court of Appeals for the Seventh Circuit, called Brady Williamson, counsel for one of the defendants-appellants, and asked if the preliminary injunction was going to be appealed. Mr. Gubbins offered to conduct a docketing conference pursuant to Circuit Rule 3 and Federal Rule of Appellate Procedure 33 in order to expedite the briefing and to set oral argument prior to June 18, 1979, the last day of the 1978-1979 Term;

* Chief Judge Thomas E. Fairchild has disqualified himself from these appeals.

- 3) The defendants-appellants filed a notice of appeal 17 days after the preliminary injunction and did not ask to expedite the appeal until they mailed a Motion for Expedited Appeal on April 20, 1979;
- 4) After receipt of the motion to expedite, John L. Gubbins had additional conferences with counsel for the parties. The motions to expedite and suggestion for an en banc hearing were initially scheduled for a discussion at a judges' meeting on May 2, 1979. The judges postponed such consideration when Brady Williamson, counsel for The Progressive, Inc., suggested that the appeal might be moot and asked the court to postpone consideration of the motion and suggestion. After the court was advised some days later that the appeal would not be moot, the motions to expedite and suggestion for hearing en banc were considered;
- 5) The Motion for Expedited Appeal as well as the suggestion to hear the appeal/en banc were denied on May 16, 1979. However, the court agreed to hear the appeal in the first week of the next Term, starting Monday, September 10, 1979;

- 6) Based on a conference with John L. Gubbins, the court also entered an order dated May 17, 1979, setting up a briefing schedule in which the reply brief was due July 2, 1979. All counsel were in agreement with that schedule. The parties also agreed that the appeal would not be set before July 16, 1979, in order to accommodate the schedule of one of the attorneys;
- 7) On May 24, 1979, Circuit Judges Luther M. Swygert, William J. Bauer, and Harlington Wood, Jr., and Senior Staff Attorney John L. Gubbins had another conference with counsel for all the parties. At that conference the briefing schedule was extended by agreement of all parties until August 1, 1979, for appellants' reply brief because of problems that appellants were experiencing in obtaining in camera materials needed to prepare their brief;
- 8) On June 15, 1979, District Judge Robert W. Warren denied appellant's motion to reconsider and vacate the preliminary injunction of March 26, 1979;
- 9) On June 15, 1979 and June 18, 1979, joint notices of appeal on behalf of all the defendants-appellants were filed;

- 10) On June 21, 1979, the individual defendants-appellants filed a motion to expedite the briefing schedule and oral argument. In that motion appellants said that they would file their brief on the appeal of the June 15, 1979, denial of their motion to vacate the preliminary injunction no later than June 22, 1979. The motion also suggested that both appeals be argued together and that the Government file their brief on June 29, 1979. Implicit in the motion is that the Government's main brief be a joint one responding to both appeals. The motion to expedite was filed only on behalf of the individual defendants-appellants and not on behalf of the defendant-appellant Progressive, Inc. Although The Progressive, Inc., had filed its brief on June 15, 1979 in Appeal No. 79-1428, it had not taken a position as to when it could file its brief in No. 79-1664. The United States of America opposed the motion to expedite because the time suggested for filing its brief was inadequate for such a complex and important case;
- 11) Although the appellants moved and were granted on May 18, 1979 permission to file a joint oversized brief in No. 79-1428, the appellants without explanation filed separate briefs. The brief of the United States must

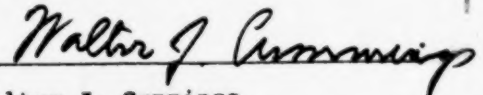
respond to the appellants' briefs in No. 79-1428 which were filed on June 15, 1979 and the five amicus briefs which were filed on May 21, May 23, May 23, June 11, and June 22. Although a party may file his brief prior to the due date, neither appellant's brief was filed until June 15, 1979, the date due. However, three of the amicus filed briefs in support of appellants by May 23;

- 12) In No. 79-1664, the appellants' briefs are due July 13, 1979. Defendants-appellants Knoll, Day, and Morland stated in their motion of June 21, 1979, to expedite, that they would file their brief on June 22, 1979. It has not yet been filed;
- 13) In the affidavit of John L. Gubbins which is attached, there is a documented effort on the part of the United States Court of Appeals for the Seventh Circuit to expedite these appeals. However, expedition was initially rejected by appellants because of indecision as to whether to go forward with the appeal. The court's efforts to expedite the appeal were later rebuffed because counsel wanted more time to thoroughly and adequately brief the appeal. Now that the individual appellants have filed a brief in No. 79-1428 and are prepared to file their brief in No. 79-1664, expedition of the filing of the

United States of America's brief and the earlier setting of oral argument is now sought by them. The position of the appellant Progressive, Inc., and the ability of its counsel to file a brief sooner than the scheduled date of July 13, 1979, are not known;

- 14) The Prayer of the Petition for Writ of Mandamus is only directed to expedition of the second appeal, No. 79-1664. The second appeal is from the June 15, 1979, denial of the motion to vacate the injunction of March 26, 1979. However, both appeals should be considered together and the court should have briefs in No. 79-1664 from the individual defendants-appellants, the defendant-appellant Progressive, Inc., and the United States of America before the appeals are orally argued;
- 15) In light of the record in this case, this court's order of June 21, 1979, granting in part defendants-appellants' motion to expedite is a reasonable decision, and oral argument during the week of September 10, 1979, remains a suitable choice.

Wherefore, the judges of the United States Court of Appeals for the Seventh Circuit pray that the motion for leave to file the Petition for Writ of Mandamus be denied.


Walter J. Cummings
Acting Chief Judge

STATE OF ILLINOIS)
COUNTY OF COOK) SS

Affidavit of John L. Gubbins

John L. Gubbins under oath deposes and says:

1. He is Senior Staff Attorney for the United States Court of Appeals for the Seventh Circuit.

2. Among his duties as Senior Staff Attorney, Mr. Gubbins assists the Judges of the Court of Appeals at prehearing conferences called pursuant to Rule 33 of the Federal Rules of Appellate Procedure. The Court of Appeals orders prehearing conferences to discuss with litigants simplification of the issues under review, to set a schedule for the filing of the record and the briefs, to consider consolidation of related appeals and to discuss such other matters as may aid in the expeditious disposition of the appeal. In civil cases, the Court of Appeals orders prehearing conferences only in those cases where there are numerous parties to the appeal, or where the issues raised are complex, or where important social and constitutional questions are raised.

3. As Senior Staff Attorney he participated in two prehearing conferences in United States of America v. The Progressive Inc., Erwin Knoll, Samuel Day, Jr., and Howard Morland, Appeal Nos. 79-1428 and 79-1664.

4. After the first prehearing conference was held, an order issued May 17, 1979 memorializing a briefing schedule which had been agreed upon by the parties.

5. Prior to the first prehearing conference Mr. Gubbins had numerous telephone conversations with the attorneys for the parties in which he urged expedition of the appeal. On March 26, 1979, Judge Warren entered his order enjoining publication of "The H-Bomb Secret - How We Got It, Why We're Telling It." Appellants filed their notice of appeal more than two weeks later on April 12, 1979. Between the date Judge Warren entered his order and the date appellants filed their notice of appeal, Mr. Gubbins had several conversations with Brady Williamson of the firm LaFollette, Sinykin, Anderson and Munson who represented The Progressive, Inc. in which he urged Mr. Williamson to file his notice of appeal quickly so that the case could be docketed and an expedited briefing schedule could be set. Mr. Gubbins also informed Williamson that the last day which the Court of Appeals would sit before summer recess was June 18, 1979. Mr. Gubbins indicated that if the parties agreed to shortened periods for filing their briefs and by moving quickly, the court would set oral argument before its summer recess.

6. Appellants filed their notice of appeal April 12, 1979 and their appearances on April 26, 1979. During this two week period Mr. Gubbins had numerous conversations with counsel for both parties. He suggested to them that a prehearing

conference be held, but he was assured by all counsel that a briefing schedule had been agreed upon, and that the parties desired early oral argument of the appeal, and that there would be no need for a prehearing conference. Mr. Gubbins told counsel to direct a motion to the Court of Appeals asking for oral argument, and he prevailed upon them to participate in a prehearing conference so that any problems frustrating an expeditious hearing of their appeal could be dealt with.

7. On April 20, 1979, counsel for The Progressive, Inc. filed with the Court of Appeals their motion for an expedited appeal. In that motion, they sought the following briefing schedule:

Defendants' brief to be delivered in hand to counsel for the Plaintiff on May 14, 1979;

Plaintiff's brief to be delivered in hand to counsel for Defendants on June 13, 1979; and

Defendants' reply brief to be delivered in hand to counsel for the Plaintiff on June 23, 1979.

Counsel also sought a date for oral argument. They agreed it was to be scheduled no earlier than June 28, 1979 in order to allow counsel for appellant an opportunity to consider the Government's reply brief.

8. On April 20, 1979, counsel for The Progressive, Inc. also filed their suggestion for a hearing en banc.

9. Shortly after appellants filed both motions Mr. Brady Williamson spoke by telephone with Mr. Gubbins asking him to hold up consideration and disposition of the motion to expedite and the suggestion for a hearing en banc.

10. One week later Mr. Williamson spoke by telephone with Mr. Gubbins again and informed him at that time that the Court

should go ahead to consider the motion to expedite and the suggestion for a hearing en banc. Mr. Gubbins scheduled the consideration of both motions to be by all the Judges of the Court of Appeals at a meeting set for May 2, 1979.

11. Prior to May 2, 1979, Mr. Gubbins held a prehearing conference to discuss the briefing schedule which the parties had agreed upon. The appellants indicated that they did not wish to adhere to the briefing schedule which they had earlier set out in their motion to expedite. They wanted it extended a week and they agreed with government counsel to the following schedule:

Defendants' brief to be filed on May 21, 1979.

Plaintiffs's brief to be filed on June 20, 1979.

Defendants' reply brief to be filed on June 30, 1979.

Oral argument by agreement of the parties was not to be set earlier than July 16, 1979.

12. On May 2, 1979, one hour before the time for consideration of appellants' motions at a meeting of all the Judges of the Court of Appeals, Mr. Williamson telephoned Mr. Gubbins and asked him to suspend any consideration of the motion to expedite. Mr. Williamson indicated that several events had taken place which would moot the appeal. Mr. Gubbins informed the Court of Mr. Williamson's call and no action was taken.

13. On May 7, 1979, appellants filed their motion to take judicial notice of adjudicative facts. By this motion appellants sought to have this Court take judicial notice of recently published reports and articles.

14. On May 9, 1979, appellants filed their motion to modify protective order. In that matter, appellants stated that the protective order of the district court prevented them from thoroughly reviewing and briefing the technical documents maintained in camera.

15. On May 16, 1979, the Court of Appeals denied the appellants' suggestion for a hearing en banc. The Court also denied appellants' motion to expedite setting oral argument. The Court determined not to hear oral argument in the latter part of July since it could be set for oral argument for the week of September 10, 1979, the very first week the Court convenes after its summer recess.

16. On May 17, 1979, the Court issued its order memorializing the briefing schedule agreed upon by counsel for both parties at the prehearing conference.

17. After preliminary consideration of appellants' motion to take judicial notice and motion to modify the protective order, the Court decided to call a second prehearing conference. This second conference took place May 24, 1979. Judges William Bauer, Luther Swygert, and Harlington Wood, Jr. presided and all counsel participated. The conference was in two parts and it took two and a half hours overall.

18. All counsel agreed at the prehearing conference of May 24, 1979 to modify the protective order governing the in camera materials, to set a new briefing schedule and to seek reconsideration from the district court of its injunction order of March 26, 1979 in the light of the recently published reports and articles submitted by appellants.

19. At the prehearing conference of May 24, 1979, there was no discussion concerning the scheduling of oral argument before September 10, 1979.

20. On June 5, 1979, the Court issued its order disposing of appellants' motions and memorializing the new agreed briefing schedule. The revised briefing schedule was set as follows:

The defendants-appellants shall file their brief on or before June 15, 1979.

The plaintiff-appellee shall file its brief on or before July 15, 1979.

The defendants-appellants shall file their reply brief, if any, on or before August 1, 1979.

21. All three Judges at the prehearing conference of May 24, 1979 indicated they wished to have time before oral argument to review the briefs and determine whether further briefing on any issue was necessary. The Court also indicated that there should be some leeway in case any of the parties needed additional time to prepare their briefs.

22. On June 15, 1979, Judge Warren denied appellants' motion for reconsideration. That very day appellants filed their notice of appeal. (Appeal No. 79-1664).

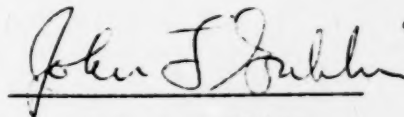
23. On June 21, 1979, appellants filed a second motion for expedited briefing schedule and oral argument. The Court granted this motion in part setting the following briefing schedule:

The brief of the defendants-appellants shall be filed herein on or before July 13, 1979.

The brief of the plaintiff-appellee shall be filed herein on or before August 7, 1979.

The reply brief, if any, of the defendants-appellants shall be filed herein on or before August 20, 1979.

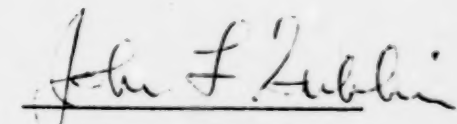
24. Appellants have not yet filed a brief in Appeal No. 79-1664.


John L. Gubbins

Dated: June 25, 1979

CERTIFICATE OF SERVICE

I hereby certify that on this 25th day of June, 1979, copies of the Response and Affidavit have been served on the Honorable Wade H. McCree, Solicitor General of the United States, on the Honorable Barbara Allen Babcock, Assistant Attorney General of the United States, on Michael Hertz, attorney for the United States Justice Department, on Earl Munson, Jr., Counsel for the Progressive, Inc., on Mark H. Lynch, Counsel for petitioners Knoll and Day, and on Paul L. Friedman, counsel for petitioner Morland, by United States mail. I certify that all parties required to be served have been served.


John L. Gubbins